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No. 82-1536

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDWARD S. SMITH,
Petitioner

VS.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

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Office - Supreme Court, U.S.
FILED

JUL 8 1983

ALEXANDER L. STEVENS,
CLERK

QUESTION PRESENTED

The convictions for conspiracy to violate Title 18 U.S.C. Section 201 prohibiting the payment of unlawful gratuities to public officials should be set aside and judgments of acquittal entered as no rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

TABLE OF CONTENTS

	<u>Page</u>
Question Presented	2
Table of Contents	3
Table of Authorities	4
Opinion Below	5
Jurisdictional Statement	5
Constitutional Provision Involved . . .	5
Statement of the Case	5
Prayer	11
Certificate of Service	12
Statement of Counsel	13
Notary Statement	14
Exhibit A	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Jackson v. Virginia</u>	11
<u>Martinez v. Winner</u>	8
<u>United States v. Caicedo-Asprilla</u>	8
<u>United States v. Galvan</u>	8
<u>United States v. Glasgo</u>	7

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is attached hereto as Exhibit A.

JURISDICTIONAL STATEMENT

The per curiam opinion entered by the United States Court of Appeals for the Fifth Circuit was entered on May 12, 1983. No Motion For Rehearing was filed. The jurisdiction of this court is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part as follows:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Petitioner was convicted in a three-count indictment. The first count alleged the making of false declarations before a Grand Jury. Utilizing the concurrent sentence doctrine, the Court of Appeals declined to review said con-

viction and vacated it in the interest of judicial economy, to avoid adverse collateral consequences to Petitioner.

Thus this appeal is based upon convictions in Counts 2 and 3 of conspiracy to commit offenses against the United States, to wit, violation of Title 18 U.S.C., Section 201.

The affirmance of these two conspiracy convictions constitutes only a holding that the commission of a substantive offense (unlawful receipt of gratuities by a public official) always includes the elements of the offense of conspiracy. Does the payment of unlawful gratuities to a government official a number of times over a significant period of time constitute evidence of an illegal conspiracy?

Counts 2 and 3 of the indictment and the Government's proof showed that one Goodman, a merchant doing business with Army Air Force Exchange Service (hereinafter referred to as AAFES) initially met Petitioner in 1961 and thereafter paid Petitioner \$400 in 1967, \$1,500 to \$1,800 a year from 1967 to 1971,

\$1,000 in 1975 and \$700 in 1978. Merchant Goodman's business always remained good with AAFES.

Merchant Taylor loaned Petitioner \$300 in 1958, bought a dinner for a number of persons including Petitioner (\$300 value) in 1962 and made payments to Petitioner in 1968, 1979, and 1980 of \$300, \$500, and \$200-\$300 respectively. Between 1962 and 1980 merchant Taylor paid Petitioner between \$1,500 and \$2,000 total. From 1975 to 1980 merchant Taylor's business went from \$2.1 million to \$158,000.

The record is replete with evidence that Petitioner had no influence whatever to control or affect either of the merchants' business with AAFES.

In conspiracy cases, the Government must prove by substantial evidence that there was an agreement between two or more persons to commit a crime. Each conspirator must know of, intend to join, and participate in the conspiracy. United States v. Glasgo, 658 F.2d 1036 (5th Cir.

1981); United States v. Caicedo-Asprilla, 632 F.2d 1161 (5th Cir. 1980).

Acts of covering up, even though done in the context of a mutually understood need for secrecy, however, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement of the conspirators. Martinez v. Winner, 548 F.Supp. 278 (D.Ct., Colo., 1982). It is not sufficient to merely establish a climate of activity that wreaks of something foul. United States v. Galvan, 693 F.2d 417 (5th Cir. 1982).

It is undisputed in this case that merchants Goodman and Taylor had no agreement or understanding to commit a crime. Each voiced an expectation that Petitioner would not hurt the payor. There was no evidence of any prior planning as to the payments of money. The payments made by Goodman and Taylor were random, unconnected, isolated, and not related to the merchants' business with AAFES. Neither merchant ever claimed that Petitioner actually did help them and neither testified that Petitioner ever

promised to help them. Rather, both merchants deduced or expected only that neither would be turned in to the police by Petitioner for making the payments. Such an understanding not to turn another in certainly does not constitute an agreement to do an unlawful act.

In the case of Taylor, five payments were made by Taylor to Petitioner over more than 22 years.

The Government's proof may have shown an illegal receipt of gratuities by Petitioner but certainly did not prove the conspiracies alleged. As to the existence of a conspiracy between Taylor and Petitioner, Taylor himself testified that there was never any verbal understanding, that Taylor only anticipated that Petitioner would not hurt him and that he could help Taylor in a merchandising position; there was never a conversation between the two as to how Petitioner could or would help Taylor; that there was never any understanding between the two as to how Petitioner could help or hurt Taylor; there were

never any agreements between the two (T96,122, 136). There was only the expectation on the part of Taylor that Petitioner would not turn Taylor in (T139,140).

As to the existence of a conspiracy between Goodman and Petitioner, Goodman specifically testified that Petitioner did not give him any understanding and that there was never any agreement between the two as to what he would or could do for Goodman and that to his knowledge Petitioner never performed any official act in Goodman's behalf on account of the monies (T222,227).

When viewing a case as unique as this one, wherein the Government witnesses themselves testified that there is no understanding or agreement which would constitute a basis for a conspiracy and when each testifies that he had a unilateral expectation that he would not be turned in by Petitioner to the law enforcement authorities, Petitioner submits that all of the Government evidence may on its face show

unlawful receipt of gratuities but none of the evidence supports conspiracy convictions. The Government did prove through Taylor and Goodman that payments were made to Petitioner but never proved that any agreement existed between Goodman and/or Taylor and Petitioner to commit any crime.

Petitioner therefore submits that after reviewing the evidence in the light most favorable to the verdict, no rational trier of fact could have found the essential elements of the conspiracies alleged beyond a reasonable doubt and that therefor the judgments of conviction in Counts 2 and 3 should be reversed and judgments of acquittal entered. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

WHEREFORE, PREMISES CONSIDERED, the Petitioner respectfully prays that a Writ of Certiorari should issue to review the opinion of the United States Court of Appeals for the Fifth Circuit and that subsequent thereto that the judgment of conviction as to Counts 2 and 3

of the indictment will be reversed and a judgment of acquittal in Counts 2 and 3 be entered herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Petition were mailed with first-class postage prepaid to the Solicitor General, Department of Justice, Washington, D.C., 20530, on the 8th day of July, 1983.



KERRY P. FITZGERALD

No. 82-1536

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD S. SMITH,
Petitioner

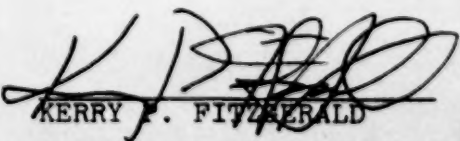
VS.

UNITED STATES OF AMERICA,
Respondent

STATEMENT OF COUNSEL

COUNTY OF DALLAS)
)
STATE OF TEXAS)

My name is Kerry P. FitzGerald and I am Counsel of Record for Edward S. Smith. I deposited in a United States Post Office in Dallas, Texas, with first-class postage prepaid, addressed to the Clerk of the United States Supreme Court, 40 copies of the Petition For Writ of Certiorari on the 8th day of July, 1983, which was within the time permitted to file said Petition.


KERRY P. FITZGERALD

SUBSCRIBED AND SWORN TO before me by
 Kerry P. FitzGerald on this the 8th day of
 July, 1983.

Susan Austin
 Notary Public in and
 for the State of Texas,
 County of Dallas.

My commission expires: 11-4-86

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-1536

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS.

EDWARD S. SMITH,
Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

May 12, 1983

Before GEE, REAVLEY and HIGGINBOTHAM, Circuit
Judges.

PER CURIAM:

The sad subject matter of this appeal is the conviction of a senior governmental official of making false declarations to a Grand Jury and of two additional counts of conspiracy to violate Title 18 U.S.C., Section 201 prohibiting the payment of unlawful gratuities to public officials.

The evidence showed a long course of "loans", some solicited by appellant, some simply offered as the result of various solicitations in the form of "sob stories" -- and none repaid -- by

two businessmen who sold substantial amounts of merchandise to the Army and Air Force Exchange Service. These advances took place over the course of Appellant Smith's twenty-some year career with that agency of the United States, one during which he rose from the position of manager of a Base Exchange to the highest civilian post within the Exchange Service. On this appeal, appellant contends that there was insufficient evidence to establish that he entered into the conspiracies, that the United States failed to establish that his false statements to the Grand Jury were material to its investigation, that the false statement count is technically defective as to wording, and that certain evidentiary rulings of the trial court were erroneous.

As for the complaints regarding the sufficiency of the evidence, we have reviewed the record with care, viewing the evidence in the light most favorable to the United States and the jury verdict as required by *Glasser v. United States*, 315 U.S. 60 (1942). It shows repeated direct and indirect solicitation by

appellant of money from each of the two merchants over the course of his career and repeated payments by them of sums in the two hundred to five hundred dollar range. These took place against the background of appellant's intimations that he was chronically pressed financially and would require cash assistance from time to time, as well as that appellant was in a position to injure or advance the payers' business prospects with the Exchange Service. Under Glasser, such evidence was amply sufficient to support a conclusion that a tacit agreement existed. See United States v. Evans, 572 F.2d 455 (5th Cir. 1978).

Appellant's sentence under the false declarations count runs concurrently with that imposed on one of the conspiracy counts. In the interest of judicial economy we decline review of it under the concurrent sentence doctrine, vacating it to avoid adverse collateral consequences to appellant. United States v. Montemayor, ____ F.2d ____ (5th Cir. April 4, 1983, sl.op. 3837, 3844-5). Should the interests of justice require reimposition of this sentence, the conviction occasioning it then can be

reviewed.

The evidentiary rulings of which appellant complains were within the trial court's broad discretion in such matters, do not present harmful error, and do not merit discussion.

AFFIRMED.